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September 7, 2007

John Burvainis  
Acting Executive Director  
Nebraska Public Service Commission  
1200 N Street  
Suite 300  
Lincoln, NE 68508

RE: Docket No. NG-0051/PI-130

In the Matter of the Commission, on its own motion, to investigate jurisdictional issues pertaining to construction and operation of a natural gas pipeline within the state of Nebraska by Nebraska Resources Company, LLC, or any other entity.

Dear Mr. Burvainis:

Northern Natural Gas Company (Northern) hereby submits for filing its Comments in the above-referenced docket.

If you have any questions, please call me at (402) 398-7097. Thank you.

Sincerely,

Penny Tvrdek  
Senior Counsel

Attachment

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its	)	
own motion, to investigate jurisdictional	)	
issues pertaining to construction and	)	
operation of a natural gas pipeline within	)	Docket No. NG-0051/PI-130
the state of Nebraska by Nebraska	)	
Resources Company, LLC, or any other	)	
entity.	)	

**COMMENTS OF  
NORTHERN NATURAL GAS COMPANY**

Northern Natural Gas Company (Northern) hereby submits these comments in response to the investigation initiated by the Nebraska Public Service Commission (Commission) on July 24, 2007, in this docket. Northern is a corporation organized under the laws of the state of Delaware, having its principal office located at 1111 South 103<sup>rd</sup> Street, Omaha, Nebraska 68124-1000. Northern is a “natural gas company” within the meaning of the Natural Gas Act<sup>1</sup> (NGA) and, pursuant to Certificates of Public Convenience and Necessity issued by the Federal Energy Regulatory Commission, is engaged in the transportation of natural gas in interstate commerce. Northern is authorized to do business in the state of Nebraska, and a key portion of Northern’s pipeline is located in Nebraska. Northern provides transportation and storage service through its interstate pipeline to Aquila, Inc., the Metropolitan Utilities District, MidAmerican Energy Company, a number of municipalities in the state of Nebraska, all of which serve the eastern third of the state, and various end users. Northern transports and delivers over half of the natural gas consumed in the state of Nebraska.

All correspondence regarding this docket should be sent to the following:

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<sup>1</sup> 15 U.S.C. § 717.

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#### **A. BACKGROUND AND ISSUES UNDER INVESTIGATION**

The Commission issued an order (Order) in this docket on July 24, 2007, initiating an investigation into certain issues related to regulation of the construction and operation of a natural gas pipeline located wholly within the state of Nebraska. The Commission stated that Nebraska Resources Company, LLC (NRC) had filed a request (July 16 Letter) for the Commission to open an investigation pertaining to NRC's plans to construct such a pipeline. However, the Commission found that the investigation should not be restricted solely to the proposed NRC pipeline, but should be expanded to include other entities or alternative pipelines that may be proposed to be constructed within the state.

The Commission set forth four issues for comment, as follows:

1. Does the definition of "high volume ratepayer" in Neb. Rev. Stat. Sec. 66-1802(7) include LDCs with volumetric demand in excess of 500 therms per day?
2. Does Nebraska's double-piping prohibition under Neb. Rev. Stat. Sec. 66-1852 apply to a pipeline providing a new interconnection to an LDC?
3. Does the Commission have jurisdiction over an Application under Neb. Rev. Stat. Sec. 66-1853(1) for a Certificate of Public Convenience to operate as a "jurisdictional utility" a pipeline located wholly within the state of Nebraska to deliver natural gas to LDCs and other customers?
4. What other regulatory authorities, including state, federal and local governing bodies of any kind, would have jurisdiction over the proposed NRC Pipeline, and what is the scope of their review?

In these comments, Northern refers to a theoretical natural gas pipeline located solely within the state of Nebraska that is constructed, owned and operated by any natural gas public utility (as defined in Neb. Rev. Stat. Sec. 66-1802(11)) not exempt under Neb. Rev. Stat. Sec. 66-1803. As indicated in the Commission's Order, such an entity may include NRC, a competitor for a similar project, or an entity planning a different project. However, since NRC requested that this investigation be initiated, Northern generally will refer to NRC in these comments, with the understanding that such comments would apply uniformly to any other similarly-situated intrastate pipeline.

## **B. COMMENTS**

**ISSUE NO. 1: Does the definition of "high volume ratepayer" in Neb. Rev. Stat. Sec. 66-1802(7) include LDCs with volumetric demand in excess of 500 therms per day?**

### **Background:**

A "high volume ratepayer" is defined in Neb. Rev. Stat. Sec. 66-1802(7) as "a ratepayer whose natural gas requirements equal or exceed five hundred therms per day as determined by average daily consumption." Under Neb. Rev. Stat. Sec. 66-1810, service to high volume ratepayers may be provided by a jurisdictional utility "at negotiated rates, contracts, and terms and conditions of service under contract." Therefore, service to such ratepayers is essentially exempt from regulation. If LDCs are *not* considered high volume ratepayers, this Commission has jurisdiction over NRC's rates and service to LDCs. If this Commission chooses to regulate NRC, NRC will then be a Hinshaw

pipeline, exempt from Federal Energy Regulatory Commission (FERC) regulation. In order to be afforded Hinshaw status under federal law, a natural gas pipeline must qualify for the exemption as set forth in Section 1(c) of the Natural Gas Act.<sup>2</sup> An intrastate pipeline is exempt from the jurisdiction of the Natural Gas Act if the state commission regulates “the rates and service of such person and facilities.”

**Summary of Comments:**

The definition of “high volume ratepayer” can reasonably be argued to include or exclude LDCs. Therefore, the Commission has adequate legislative authority either to regulate or decline to regulate NRC’s service to LDCs. If the Commission chooses to exercise jurisdiction over NRC, the Commission must take the necessary steps by establishing a comprehensive set of regulations governing the construction and operation of an intrastate pipeline to protect affected landowners, stakeholders, and the environment.

**COMMENTS:**

NRC addressed this issue in its July 16 Letter, arguing that an LDC is not a high volume ratepayer, and therefore, the Commission would have jurisdiction over NRC’s service to LDCs. Northern believes this issue can reasonably be argued either way.

First, NRC states that it “believes that due to the essentially local nature of the service NRC proposes to provide to customers in Nebraska, the NRC Pipeline *should* be regulated primarily by the Nebraska Commission rather than the FERC.” Northern submits that this conclusion is one the Commission must reach on its own, while understanding the implications of the conclusion. Based on the discussion on page 2 of the July 16 Letter, NRC contemplates building a pipeline that will “interconnect to an

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<sup>2</sup> 15 U.S.C. § 717(c).

LDC already served by an interstate pipeline.” NRC will be receiving and transporting gas that has been in interstate commerce and will be delivering that gas to an LDC for redelivery to retail customers. Since that identical service is provided today by an interstate pipeline operating in interstate commerce and subject to the jurisdiction of the FERC, there is no inherently “local nature” to the service. It would be reasonable for the Commission to determine that the service<sup>3</sup> is part of interstate commerce. Therefore, the Commission reasonably could conclude either way. Northern believes that it makes sense for the Commission to regulate NRC only if the Commission is prepared to establish and enforce appropriate regulations to protect the public. If the Commission decides that the service is not necessarily local, the Commission can choose to defer to regulation by the FERC. However, if the Commission concludes that the service is of a local nature, that conclusion would have the following implications: (1) The Commission is responsible for protecting the public and the customers of NRC, and (2) as discussed in connection with Issue No. 2, the “double-piping prohibition” set forth in Neb. Rev. Stat. Sec. 66-1852 would apply.

Second, NRC does not argue that an LDC in this context would not be a ratepayer. The term “ratepayer” is not defined in the State Natural Gas Regulation Act, but the dictionary provides simply that a “ratepayer” is “one that pays rates.”<sup>4</sup> An LDC would have a contract with NRC that required payment of specific rates, and therefore, the LDC clearly would be a “ratepayer.” However, NRC maintains that an LDC has no “consumption” or “requirements” as described in the statute. Northern believes that the

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<sup>3</sup>The service described by NRC is the transportation of natural gas that has been shipped in interstate commerce and delivery of that gas to another party that will distribute and resell the natural gas.

<sup>4</sup> *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004. 30 Aug. 2007. <Dictionary.com

Commission could reasonably conclude to the contrary. Excluding LDCs from the definition of “high volume ratepayer” would be putting form over substance, lending the statute no supportable justification. If large end users are sophisticated enough not to need the protection of regulation, certainly an LDC would be similarly sophisticated.<sup>5</sup> The state of Nebraska regulates the rates and services of the LDC and can oversee the LDC’s purchasing practices, thereby protecting retail customers without specifically setting the rates charged by NRC to the LDC. This is precisely how the vast majority of states oversee the rates paid by LDCs to their suppliers, including interstate pipeline transporters.

An LDC does have “requirements” it must meet in order to serve its load. The statute does not use the term “end user,” which would clearly mean that LDCs should be excluded. “Consumption” is defined in the dictionary as “the act of consuming, as by use, decay, or destruction.”<sup>6</sup> An LDC certainly has “usage,” as the gas going through the meter is the primary product sold by a utility.<sup>7</sup> The legislature has used the terms “consumption” and “usage” interchangeably in Neb. Rev. Stat. Secs. 66-1810(2) and 1802(1).<sup>8</sup> An LDC actually consumes natural gas in its own operations, including use in heating buildings and operating equipment such as gas-fired generators and compressors, and some gas in the LDC’s system becomes “lost and unaccounted for” because of leaks and other issues. The words “requirements,” “consumption,” “demand” and “usage” are often used interchangeably when talking about an LDC’s system load. In the situation

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<sup>5</sup> Note the legislative history cited by NRC in the July 16 Letter on page 4.

<sup>6</sup> *Id.*

<sup>7</sup> Senator Landis, sponsor of LB1249, referred to a “high volume ratepayer” as a “high-end user.” Transcript of Floor Debate at 12518 (Neb. 2006).

<sup>8</sup> Sec. 1802(1) reads, “Agricultural ratepayer means a ratepayer whose usage of natural gas does not qualify the ratepayer as a high-volume ratepayer . . . .”

being considered here, which deals with transportation service to be provided by NRC, an LDC clearly would be the buyer or “consumer” of the transportation service, because it uses the service. A buyer of a service is a consumer of such service, just as a buyer of goods is a consumer of such goods. Economists often refer to the “consumers” of goods *and services*. The term “consumption” can be interpreted simply to equate to gas volumes delivered to an entity as measured at a meter. Northern is not aware that any evaluation has ever been done in Nebraska to verify whether large volume end users are actually physically burning 500 therms of gas per day; the volume measured at the meter has been the determining factor. End users do not always physically burn all the gas delivered to them, either. For example, Northern believes a gas processor would be considered a “high volume ratepayer,” even though a gas processor removes liquids from the gas stream, resells those liquids and discharges the remainder of the gas stream to another entity. Some end users redeliver and sell gas to a neighboring facility. Thus, Northern believes that LDCs reasonably can be considered to have “requirements” and “consumption.”

Third, NRC argues that LDCs have always been considered jurisdictional utilities, not high volume ratepayers. NRC claims:

[I]f LDCs were deemed to be high-volume ratepayers, the rates charged by LDCs to retail consumers would be exempt from the Nebraska P.S.C.’s jurisdiction due to the statutory exemption from regulation by the Nebraska commission of high-volume ratepayers themselves . . . and not merely the rates charged to them.

This argument is not supportable. An entity can be a regulated public utility for some purposes and exempt from regulation for other purposes. For example, Neb. Rev. Stat. Sec. 66-1802(11) exempts from the definition of “natural gas public utility” the activity



of selling compressed natural gas for end use as a motor vehicle fuel. A regulated public utility may conduct a variety of other activities, inside or outside the state of Nebraska. The fact that the public utility is not subject to the Commission's jurisdiction for some purposes would not preclude the Commission from rightfully regulating the rates and services of the public utility in appropriate circumstances.

Finally, NRC argues that the legislative history supports an interpretation that excludes LDCs from the definition of "high volume ratepayer." Northern submits that the legislative history reasonably can be interpreted either way, just as the statute can. The legislature may have intended to exclude LDCs, or the legislature merely may have used an end user as an example of "really, really big, big users who are very adroit . . . at covering their costs." Transcript of Floor Debate for LB 790 at 7602 (Neb. 2003). After all, regardless of the outcome of this investigation, the group of high volume ratepayers in the state will always be made up *primarily* of end users. This fact alone does not bar an LDC from inclusion within the definition, however.

In conclusion, the Commission reasonably can assume or decline to assume jurisdiction over NRC's service to an LDC. However, if the Commission chooses to proceed with regulating the pipeline, the Commission must begin by establishing comprehensive regulations, as discussed below.

**ISSUE NO. 2: Does Nebraska's double-piping prohibition under Neb. Rev. Stat. Sec. 66-1852 apply to a pipeline providing a new interconnection to an LDC?**

**Background:**

The "double-piping prohibition" reads as follows:

Except as otherwise expressly authorized in the State Natural Gas

Regulation Act, no person, public or private, shall extend duplicative or redundant natural gas mains or other natural gas services into any area which has existing natural gas utility infrastructure or where a contract has been entered into for the placement of natural gas utility infrastructure.

All LDCs in Nebraska currently are served by an interstate pipeline. A large number of communities in the eastern part of the state are served from Northern's interstate pipeline, which is regulated by the FERC. Therefore, Issue No. 2 presents the question of whether an intrastate (Hinshaw) pipeline is prevented from duplicating the Nebraska facilities of an interstate pipeline that are already in place to serve an LDC.

**Summary of Comments:**

The issue presented here is whether an interstate pipeline's (including Northern) current service to LDCs in Nebraska is protected from bypass by an intrastate pipeline by virtue of the fact that such bypass inherently would require a duplication of natural gas infrastructure. The double-piping prohibition contains no conditions or exceptions. Therefore, the double-piping statute clearly would prevent NRC from building the proposed pipeline. The purpose of the statute is to prevent duplication of pipe. Whether the pipe that would be duplicated is owned by an interstate pipeline is irrelevant.

**COMMENTS:**

The double-piping statute has been interpreted broadly by the Commission. In 2004, the Commission denied a motion to dismiss a complaint by Kinder Morgan, Inc. (Kinder Morgan) against the City of Hastings (Hastings). In that order, the Commission found that it could extend its jurisdiction over Hastings, normally a non-jurisdictional utility, for purposes of enforcement of the double-piping statute. The Commission noted that, although its jurisdiction normally extended only to public utilities, the prohibition

was not limited to “natural gas public utilities,” but included “any person, public or private.” The Commission went on to note the “legislative policy against duplicative piping.” Kinder Morgan, Inc., v. City of Hastings, Nebraska, *Order Denying Motion to Dismiss*, Docket No. FC-1319, entered August 31, 2004.

Northern and the other interstate pipelines operating in the state of Nebraska have made substantial investments in infrastructure that provide benefit to the state through both property taxes and income taxes. The legislative policy against duplicative piping applies equally to duplication of lines installed by interstate pipelines. Such duplication would constitute economic waste, result in harm to the environment and additional risk to public safety. Senator Landis has referred to the state’s policy by stating, “We’ve already decided we don’t want two sets of pipes, just like we don’t want two electric lines or two telephone poles. You don’t want to dig up the ground twice, and you don’t want to have them next to each other, and where we do, it’s dangerous. . . . It’s dangerous, high cost, stupid.” Transcript of Floor Debate for LB 1249 at 12495 (Neb. 2006). The obvious interpretation of the statute, based on a plain reading, is that the statute prevents NRC from duplicating pipe that already exists to serve an LDC, including pipe belonging to an interstate pipeline. Further, there is absolutely no policy reason to exclude interstate pipelines from the protection of the statute.

NRC begins its argument by threatening that, if this Commission finds the statute applies, NRC will go to the FERC for a certificate of public convenience and necessity, and this Commission’s potential jurisdiction over NRC will be pre-empted. This is an empty threat.

Should this Commission determine that it has jurisdiction over NRC and then

choose to exercise that jurisdiction, NRC will be a Hinshaw pipeline exempt from FERC jurisdiction. NRC notes this very fact on page 2 of the July 16 Letter, where it states, “Accordingly, if the rates charged by the NRC Pipeline are subject to regulation by the Nebraska Public Service Commission, the NRC Pipeline would be exempt from federal regulation.”

If a public utility is exempt from federal regulation as a Hinshaw pipeline, the FERC has no authority over the entity. The entity cannot simply *elect* to be regulated by the FERC unless the state commission declines to regulate.<sup>9</sup> Therefore, the issue of pre-emption discussed by NRC on page 5 of the July 16 Letter would never arise.

Second, NRC alleges that the state of Nebraska has no public policy interest in preventing Nebraska LDCs from improving the reliability of their gas supplies, from accessing cheaper gas supplies or in protecting the interstate pipeline currently serving the LDC from competition from other interstate suppliers. July 16 Letter at page 6. NRC is wrong. One could just as well allege that the state of Nebraska has no public policy interest in preventing retail customers from improving the reliability or price of their gas supplies. The state has a clearly enunciated policy against wasteful, redundant pipe, which causes increased cost, raises unnecessary environmental issues, and causes increased risk to the safety of the public. The state’s policy is articulated forcefully as an outright prohibition. The Commission must respect that policy and determine that the statute applies in the situation described in Issue No. 2.

Finally, NRC claims that the legislative history of Neb. Rev. Stat. Sec. 66-1852 makes it clear that end users are not governed by the statute. Northern maintains that

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<sup>9</sup> See 15 U.S.C. § 717(c). The state commission must exercise regulatory jurisdiction over the rates, service and facilities of the pipeline in order for the pipeline to qualify for the Hinshaw exemption.

Nebraska's double-piping statute is clear and unambiguous;<sup>10</sup> moreover, NRC failed to quote the portions of Senator Landis's remarks that are relevant to the issue presented here. The full text of his remarks is set forth below:

It's a chance to give some legislative history. I've been asked about a provision of the bill that says that it's the public policy of the state not to permit double piping by certain entities that are listed in the bill, and to which we have added the word "entity" in addition to natural gas company and municipal operation, and the question is, what does that mean and what's its implication? First, it starts from the idea that it's unwise and bad public policy to be authorizing multiple pipes by essentially competing entities. One of the reasons is you can just connect the pipes up and get access to them. You don't have to lay down two pipes. You just allow access through one. So it's bad . . . it's bad planning and it's inefficient to have double piping. But by adding the word "entity," the question is, what does that mean? And let me tell you what it's meant to mean. It's meant to mean that it applies to those entities which are not otherwise defined by the act who are in the marketplace of natural gas, who hold themselves out as doing it or who provide that service at a fee or provide natural gas to others. What doesn't it mean, because this is the important one. What it doesn't mean is that if there's a large volume user who is capable of running their own pipe to somebody else's pipe, that in fact they can create a pipeline for themselves. Example of that would be NPPD, who wants a redundant line from where they are to a natural gas supply. They would be the only user. They wouldn't turn around and sell it. They wouldn't be in the marketplace. They would be, essentially, a high volume user, using it only for themselves. Fine. No problem. They're not in the marketplace and they're not subject to the double piping. It's not what we're after with that public policy. If the university were to act on its own and lay a pipe to get natural gas simply for the university, that too would not apply. In other words, what's covered by the act, it's where an entity not otherwise described is in the marketplace. It clearly covers them. And where does it clearly not apply? It clearly doesn't apply when a single entity, acting on its own to provide gas only for itself, creates essentially a pipeline for itself and only itself, and then this act doesn't apply and that provision doesn't apply.<sup>11</sup>

Thus, if the Commission is to turn to legislative history for help in interpreting the statute, the legislative history makes it clear that any pipeline built by an entity "in the

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<sup>10</sup> Since the statute is clear, turning to legislative history is unnecessary. Metro. Util. Dist. v. Aquila, Inc., 271 Neb. 454; 712 N.W.2d 280, 285 (2006).

<sup>11</sup> Transcript of Floor Debate for LB 790 at 8080 (Neb. 2003).

marketplace” (e.g., NRC), is subject to the prohibition.

**ISSUE NO. 3:** Does the Commission have jurisdiction over an Application under Neb. Rev. Stat. Sec. 66-1853(1) for a Certificate of Public Convenience to operate as a “jurisdictional utility” a pipeline located wholly within the state of Nebraska to deliver natural gas to LDCs and other customers?

**Background:**

The answer to this question is driven simply by whether the Commission intends to regulate the rates and services of NRC as a jurisdictional utility. If so, the response to this question is yes. If not, the answer is no.

**Summary of Comments:**

The important question that must be asked in connection with Section 66-1853(1) is what standard of review should be applied to the determination of public convenience. Currently, no implementing regulations exist. If this Commission sets out to regulate NRC, certificate application regulations must first be established. Those regulations must provide for a determination of whether the project complies with Nebraska’s clearly enunciated policy against redundant natural gas infrastructure.

**COMMENTS:**

NRC maintains that the Commission has jurisdiction over the granting of a certificate of public convenience and necessity to allow NRC to operate as a jurisdictional utility. Northern agrees that the Commission has such jurisdiction if it determines that a “high volume ratepayer” does not include LDCs. In that event, the Commission could assume jurisdiction over NRC and would have authority to grant a certificate of public convenience and necessity to NRC to authorize construction of a pipeline. If this Commission does not intend to regulate NRC’s rates and services, NRC

will not be a Hinshaw pipeline. In that case, the FERC would have authority over the construction of the pipeline. It is important to note that the issue being discussed in this docket is whether the proposed line should be subject to state or federal jurisdiction—*not* whether the proposed pipeline is in the public interest.

Northern absolutely agrees that, if the Commission intends to exercise jurisdiction over NRC, it must proceed to establish implementing regulations to clarify how this jurisdiction will be exercised. In Nebraska, a fundamental threshold evaluation that must be made prior to issuance of a certificate is whether the project will result in unnecessary or redundant natural gas infrastructure. As previously discussed, Nebraska has a clear public policy against redundant natural gas facilities. Even if the Commission were to decide that the double piping statute *per se* did not apply to the NRC project, the clearly enunciated state policy against redundant natural gas infrastructure is incorporated into the public convenience standard. The Commission must establish regulations to this effect.

The purpose of the Commission's power to grant a certificate for the construction of an intrastate pipeline under Section 66-1853(1) is to ensure that the Commission conducts a reasonable evaluation of whether the "public convenience" will be met by construction and operation of the pipeline. More than anything, the determination of whether the public convenience will be met must be based on the public policy of the state, which clearly includes whether the proposed project would constitute redundant natural gas facilities.

Additional examples of necessary regulations are discussed in Northern's response to Issue No. 4.

**ISSUE NO. 4:       What other regulatory authorities, including state, federal and local governing bodies of any kind, would have jurisdiction over the proposed NRC Pipeline, and what is the scope of their review?**

**Summary of Comments:**

The federal government and other states have been regulating the construction and operation of natural gas pipeline assets for decades. Over this extended period, they have enacted a comprehensive body of regulations to ensure an orderly development of capital-intensive facilities and to protect the environment, landowners and other stakeholders. The Commission currently lacks sufficient regulations to implement Section 66-1853(1) and lacks any specific construction or environmental requirements for pipelines in the state. If the Commission wants to assume jurisdiction over NRC, appropriate regulations must be established for the protection of affected landowners, stakeholders, and the environment. First and foremost, regulations must be established that set forth a certificate application process and guidelines for determining whether a certificate should be issued. As discussed in response to Issue No. 3, these regulations must provide for a determination of whether the project complies with the state's policy against redundant natural gas infrastructure. Second, assuming that a certificate is issued, regulations governing the construction and operation of the pipeline must be established. High pressure, large-diameter and capital-intensive pipelines traversing farm fields, wetlands and other areas where no other infrastructure currently exists can create issues not encountered by low-pressure, small-diameter distribution systems built in cities and towns. This difference between LDCs and pipelines should be recognized by the Commission and appropriate regulations established.



**COMMENTS:**

The purpose of the Commission's power to grant a certificate for the construction of an intrastate pipeline under Section 66-1853(1) is to ensure that the Commission conducts a reasonable evaluation of whether the "public convenience" will be met by construction and operation of the pipeline. This concept incorporates issues of safety, environmental protection, economic waste, and public need and benefit.

As previously discussed, Nebraska has a clear public policy against redundant natural gas facilities. This clearly enunciated state policy must be incorporated by regulation into the public convenience standard.

In addition, a variety of other regulations are required. In order to afford due process to the proposed pipeline entity as well as to various stakeholders and to meet the requirements of the statute, the Commission must establish regulations setting forth a certificate application process. That process must include a review of the need for the pipeline (including whether construction of the pipeline would violate Nebraska's double-piping statute or policy), sufficient environmental and safety review and oversight, and the opportunity for public and other agency input and involvement, as appropriate.

The Commission currently lacks regulations to implement its certificate statute and lacks any specific construction or environmental requirements for pipelines in the state. If the Commission intends to assume jurisdiction over NRC, appropriate regulations must be enacted to protect affected landowners, stakeholders, and the environment. Both state and federal regulatory agencies with jurisdiction over pipeline

construction recognize the importance of their role in protecting the public interest. Even at the state level, meaningful regulations protecting landowners and the environment have been enacted. *See, e.g.,* Minn. Rules, Chapter 7852; Iowa Admin.Code §§ 199-10.1 *et seq*; Wis. Stat. § 30.205 (2006).

These state laws provide for a wide variety of oversight and regulation of intrastate pipelines. Although the scope of each state law varies, the laws of the state of Minnesota are analogous to the type of review conducted by the FERC in its oversight of interstate pipeline construction. Minnesota law, for example, requires an assessment of proposed pipeline construction on the natural environment, including natural areas, wildlife habitat, water, lands of historical, archeological, or cultural significance, forestry and recreational lands. Further considerations include population density, planned future use of property, cost and accessibility, and the cumulative potential effects of related or anticipated future pipeline construction. Minnesota rules also require a public notice of an application, public hearings, route approval, alternative route analysis, and application information on pipe size, diameter, wall thickness, operating pressures, associated pertinent facilities, and right-of-way and easement requirements. The application requires information on minimum depth of cover, requirements for temporary rights-of-way, and right-of-way preparation and construction procedures. Applicants must also detail restoration measures that will be employed.<sup>12</sup>

The state of Iowa requires that a petition for permit be filed by an applicant. The law also prescribes informational hearings, and directs the Iowa Utilities Board to conduct inspections during the construction and maintenance of the pipe. The state of

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<sup>12</sup> Even with extensive regulations, an intrastate pipeline constructed in 2003 by the City of Hutchinson in Minnesota encountered significant landowner opposition and environmental violations.

Wisconsin requires applicants to submit a proposed project to a pre-application process prior to applying for a certificate of public convenience and necessity. The Wisconsin Public Utility Commission reviews proposed pipeline routes, conducts public hearings, and reviews findings on environmental issues as well as identified routing issues.

Interstate pipelines are governed by the FERC and the panoply of federal regulations enacted to protect air, water and land quality. Part 157 of the FERC's regulations (18 CFR §§ 157 *et seq.*) sets forth the process, including the application requirements, for the granting of a certificate of public convenience and necessity. Prior to pipeline construction, projects must receive environmental clearances from the United States Fish and Wildlife Service and from the state historical preservation office.<sup>13</sup> Pipelines undertaking major pipeline construction projects must also submit a series of thirteen resource reports that provide detail to policy makers identifying environmental impacts to water bodies, wetlands, and cultural resources and must describe compliance measures taken with regard to sound levels, protection of threatened and endangered species, and federal and state air quality standards. *See* 18 CFR 380.12

These reports provide the crux of federal review of projects. In addition, the FERC or its agent will prepare an environmental assessment, hold an open comment period on the data and the conclusions of the environmental reports, and may engage the public by conducting "scoping meetings," or public hearings, in the project area. The FERC will not issue a certificate of public convenience and necessity without proper attention to these environmental, historical and cultural resource issues. It is also the general practice of the FERC to condition an order authorizing a pipeline construction

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<sup>13</sup> The rules of the Federal Energy Regulatory Commission governing construction of a pipeline are found at 18 CFR §§ 157.1 *et seq.*

project on compliance with general and project-specific construction requirements. Bi-weekly reports, on-site audits, and required documentation in support of compliance with these conditions are the primary mechanisms of enforcement. In addition, the FERC has the power to issue monetary sanctions for non-compliance.

FERC also enforces special environmental provisions by requiring pipelines to adhere to the agency's *Upland Erosion Control, Revegetation, and Maintenance Plan (Plans)* and the *Wetland and Waterbody Construction and Mitigation Procedures (Procedures)* (collectively, the Plans and Procedures). The Plans govern construction and restoration measures for the construction of pipeline in order to prevent erosion, protect the environment and ensure proper revegetation and restoration efforts by the pipeline after the completion of construction. The Procedures govern construction in wetlands and near water bodies and outline baseline mitigation measures required of pipeline contractors. They also detail regulations on preconstruction planning, the use of environmental inspectors, the methods that may be employed in crossing water bodies and the provisions applicable to hydrostatic testing.

Other federal agencies exercising some degree of environmental oversight include the Environmental Protection Agency, which may take an active role in the FERC's environmental assessment, public comment, and scoping processes, as well as tribal agencies, where tribal land is being crossed. Another federal agency with oversight authority is the Army Corps of Engineers, in cases where the construction will affect navigable waters.

Every state that has undertaken oversight of pipeline projects has incorporated many of these same features to ensure that the public interest and the environment are

protected. Additionally, states have enforced protective construction methods prior to approval and during construction, through oversight by the state department of natural resources, or a state agency with comparable regulatory and enforcement powers. State departments of natural resources generally have oversight of construction storm water pollution prevention plans, protection of listed threatened and endangered species, both flora and fauna, waste and hazardous waste disposal, air permits (for construction equipment), noise control, and emergency response management. The authority of individual state departments of natural resources vary widely from state to state.

Agricultural land is also an area of specialized oversight. State departments of agriculture have engaged pipeline operators in ensuring proper compliance with agricultural issues, such as proper topsoil segregation and compaction, tile maintenance, repair and replacement, erosion control and management, depth of cover, removal of construction debris, and weed and tree clearing. Some states have insisted on pre-construction agreements that detail construction measures that must be undertaken to address these specific agricultural issues. These agreements will include provisions for monitoring, reporting, restoration compliance, and enforcement. Northern, for example, has such an agreement in place for specific construction in the states of Iowa and Minnesota.

Landowner protection is another important role for the FERC in considering applications for pipeline construction by interstate pipelines. The FERC defines “landowner” broadly to include those landowners that are directly affected by the project, whose land abuts either side of an existing right-of-way owned by the pipeline, and residences within fifty feet of the construction area (including staging areas and new or

improved access roads). FERC regulations require notice to landowners and appropriate newspaper publication of an application. In many instances, the FERC also requires written notification to affected landowners prior to the commencement of construction.<sup>14</sup> As detailed above, landowners are also specifically invited to environmental “scoping meetings” held by the FERC to review the environmental assessment document prepared by the FERC or its agent. Landowners are provided a comment period and opportunity to provide input at the public meetings.

In summary, the Commission lacks regulations implementing its certificate statute. A comprehensive set of regulations must be established that govern the application process and provide for oversight of the construction and operation of an intrastate pipeline.

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<sup>14</sup> See generally, 18 CFR 157.6(d).

### C. CONCLUSION

In conclusion, this Commission should make a policy choice to regulate NRC or to defer that regulation to the FERC. The language of the State Natural Gas Regulation Act would support either choice. If this Commission chooses to regulate NRC, it must do so responsibly, by establishing a comprehensive set of regulations that protect the state. Those regulations must incorporate the state's clearly enunciated policy against redundant natural gas infrastructure, including facilities that are redundant with those of an interstate pipeline's.

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September 7, 2007